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IN THE

# Supreme Court of the United States

October Term, 1967

No. 1119

SIDNEY ELLIOTT, WINNIE BUCKLIN, MABEL FERGUS and JOHN (BEANS) REARDON, individually and as the Shareholders' Protective Committee of Long Beach Federal Savings and Loan Association; LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION, a Federal mutual savings and loan association; and Intervenor, N. JOSEPH ROSS,

*Petitioners,*

*vs.*

FEDERAL HOME LOAN BANK BOARD, FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, EQUITABLE SAVINGS AND LOAN ASSOCIATION, a California corporation; JOSEPH FIELDS, MARION FIELDS, RALPH FIELDS and THE SAVINGS AND LOAN COMMISSIONER OF CALIFORNIA,

*Respondents.*

## Petition of Intervenor N. Joseph Ross for Certiorari to the United States Supreme Court.

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FEDERAL HOME LOAN BANK BOARD, FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, EQUITABLE SAVINGS AND LOAN ASSOCIATION, a California corporation; JOSEPH FIELDS, MARION FIELDS, RALPH FIELDS and THE SAVINGS AND LOAN COMMISSIONER OF CALIFORNIA,

*Respondents.*

## Petition of Intervenor N. Joseph Ross for Certiorari to the United States Supreme Court.

*To the Chief Justice and the Associate Justices of the Supreme Court of the United States:*

Petitioner N. Joseph Ross, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled case on August 18, 1967.[1]

[1]A separate Petition for Certiorari is being filed concurrently herewith on behalf of the other petitioners named in the caption.

## Opinion Below.

The opinion of the Court of Appeals for the Ninth Circuit was filed August 18, 1967, and is not yet reported. A true and correct copy of the Court of Appeals' opinion is annexed hereto as Appendix A. The opinion of the District Court (S.D. Calif.) is reported at 233 F. Supp. 578 and is also annexed as Appendix I to the companion petition for certiorari being filed by Long Beach Federal Savings and Loan Association, *et al.*

## Grounds of Jurisidiction.

The opinion of the Court of Appeals for the Ninth Circuit, reversing the judgment of the United States District Court for the Southern District of California in three related cases (consolidated for disposition on appeal) was filed August 18, 1967, and the judgments of the Court of Appeals (one in each of the three consolidated cases) were filed and entered as of that date. A timely petition for rehearing was filed in behalf of Long Beach and its Shareholders' Protective Committee and received by the Court of Appeals on September 14, 1967. An order permitting the filing of the petition was subsequently made on September 20, 1967 and confirmed on January 12, 1968. On the latter date, the court made an order denying said petition for rehearing without opinion. A copy of the Court of Appeals' opinion, judgments, and order denying rehearing are annexed hereto as Appendix A. Jurisdiction of this Court on certiorari is based upon 28 U.S.C., Section 1254(1).

## Constitutional and Statutory Provisions Involved.

The Constitutional and Statutory Provisions involved are:

*United States Constitution,* Fifth Amendment;
12 U.S.C., Section 1464(a);
5 U.S.C., Sections 704, 706 (former Sec. 1009 (c)(e)).

Each of the foregoing provisions is set forth in Appendix II to a Petition for Certiorari being filed concurrently herewith by the other petitioners herein (Long Beach Savings and Loan Association, *et al.*).

## Statement of the Case.[2]

The present case arises out of the merger of Long Beach Federal Savings and Loan Association (hereinafter "Long Beach"), a federally chartered mutual savings and loan association, into Equitable Savings and Loan Association (hereinafter "Equitable"), a California state chartered savings and loan association, and out of the actions of the Federal Home Loan Bank Board (hereinafter "Bank Board") with respect thereto.[3]

By reason of the merger and under the terms of the Merger Agreement, the shareholder depositors of Long

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[2]A more comprehensive statement of the case is contained in the separate Petition for Certiorari being filed concurrently in this matter by Long Beach Savings and Loan Association and its Shareholders' Protective Committee, to which Petition the Court's attention is respectfully invited.

[3]Petitioner N. Joseph Ross, one of the shareholder members of Long Beach, intervened in these actions in the trial court and has participated in subsequent proceedings. See discussion, *infra.* He has elected to file a separate petition for certiorari pursuant to Rule 46.

Beach were to receive shares of Equitable stock commensurate with their share balances in Long Beach as of a specified date. At the insistence of the Bank Board, the Merger Agreement contained certain provisions whereby specified categories of Long Beach shareholders were precluded from participating in such Equitable stock[4] despite provisions of the Long Beach Charter (Section 9) which assured pro rata distribution of assets to all members of Long Beach "in the event of voluntary or involuntary liquidation, dissolution, or winding up of the association." [Pltf. Ex. 19].

The excluded categories consisted of:

1: Those shareholder depositors whose accounts had been pledged as of a specified date, and

2. Recent accounts in excess of $10,000.00 [Pltf. Ex. 12/9/63—10 A, pp. 47-48].

Anticipating a challenge to the exclusionary provisions by and on behalf of the excluded shareholders, the Merger Agreement expressly provided:

> "This Agreement is not intended to prohibit any shareholder member of Long Beach from taking appropriate action to exercise such rights, if any, which he may have to contest the merits or validi-

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[4]The Bank Board based its action on asserted new money coming into Long Beach during the period. Long Beach and the Shareholders Committee contended this new money was of great value and benefit to the Association. Since the case was disposed of by the District Court on summary judgment, this issue has never been tried. Nor did the Court of Appeals base its decision on this ground; since it found the Bank Board's action immune from judicial review, it did not reach the merits of the Board's action and indeed could not do so on the record before it.

ty of the plan of dissolution of Long Beach, *or any part thereof,* incorporated herein." (Emphasis added). [Pltf. Ex. 12/9/63—10 A, p. 47].[5]

The Merger Agreement—containing the above provision—was approved by the Bank Board and the California Savings and Loan Commissioner (hereinafter the "Commissioner"), whereupon the merger was consummated on September 10, 1963. (233 F. Supp. 578 at 587). As anticipated, a legal challenge to the exclusionary provisions of the Merger Agreement was asserted forthwith in the form of three actions, two filed September 10, 1963, and the third September 17, 1963.

The first of these actions (No. 63-1072 PH), described as one to quiet title and for declaratory relief, was brought in the United States District Court, Southern District of California, Central Division (now Central District), by Long Beach and four individuals constituting the Shareholders' Protective Committee, the latter suing as individuals, as the Committee and as representatives of the entire class of Long Beach shareholders. Jurisdiction of the District Court was invoked under 28 U.S.C. §§1331 and 1391(e) and 12 U.S.C.

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[5]The Bank Board agreed to the insertion of the provision that the validity of any part of the agreement could be contested. (See Findings of United States District Court, 233 F. Supp. 578, 596). (The District Court treated its Memorandum Opinion as incorporating its findings of fact and conclusions of law; see 233 F. Supp. at 599).

The ballots by which the Long Beach shareholder members approved the Merger Agreement expressly stated that they were cast in reliance upon the aforesaid provision (See Opinion of Court of Appeals, p. 7; District Court Findings, 233 F. Supp. at 587).

§§1464(a), 1464(b), 1464(c), 1464(d) and 1725 [1 R. 1, 3, 4].[6]

The second action, which was also one to quiet title and obtain declaratory relief, was filed in the California Superior Court by the same individuals, suing in the same capacity as were plaintiffs in the district court action filed on the same day. The defendants in this action are the Bank Board, Equitable, Long Beach and "John Does 1 through 70,000". On October 10, 1963, the Bank Board removed this action to the District Court, where it was docketed as No. 63-1230 PH. Jurisdiction of the District Court was invoked under 28 U.S.C. §§1441 and 1442(a)(1) [2 R. 1].

The third action (No. 63-1107-PH) was filed in the District Court by Equitable against the Shareholders' Protective Committee, the Bank Board, Long Beach and some individual Long Beach shareholders. This action was described as one in interpleader and for declaratory relief. Jurisdiction of the District Court was invoked under 12 U.S.C. §§1464, 1464(d), 1725, 28 U.S.C. §§1331, 1335, 1397, 2361, F.R.C.P. Rule 22, and the District Court's general equity interpleader powers [3 R. 2].

During the course of the trial court proceedings, the Commissioner was added as a party defendant in Civil Actions Nos. 63-1107 PH and 63-1230 PH. Equitable was added as a party in Civil Action No. 63-1072 PH.

N. Joseph Ross, the present petitioner, being one of the shareholder depositors of Long Beach who would be excluded from participating under the above exclusion-

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[6]For record reference explanation see footnote 8.

ary clauses, sought and obtained leave to intervene in all three actions and has participated in subsequent proceedings[7] [1 R. 343, 409; 2 R. 425, 506; 3 R. 322, 392].[8]

The basic issue in the three actions concerned the validity of the exclusionary provisions which, it was contended, contravened the terms of the Long Beach Charter and the applicable provisions of law, including congressional enactments, and thereby exceeded the authority of the Bank Board.

It was subsequently stipulated that some 585,000 shares of Equitable stock (the pro rata shares of those not within the exclusionary clauses) might be distributed forthwith [3 R. 167, 180, 307]. Further proceedings were then had directed to the remaining shares of Equitable stock (in excess of 200,000 shares) being the portion which on a pro rata basis would have gone to those members of Long Beach which the Merger Agreement purported to exclude from participation.

Long Beach, the Shareholders' Committee, Equitable and Intervenor Ross thereupon moved for summary judgment, seeking a judicial determination that the exclusionary provisions were invalid as a matter of law and that pro rata distribution of the Equitable

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[7]The Court of Appeals does not make express mention of Intervenor Ross but his intervention and the role he has played in these proceedings is amply reflected in the record of the trial court and on appeal (See, *e.g.*, Trial Court Opinion, 233 F. Supp. at 583).

[8]References in this brief to the original papers in No. 20378 (D.C. No. 63-1072 PH), No. 20447 (D.C. No. 63-1230 PH) and No. 20522 (D.C. No. 63-1107 PH) are designated "1R", "2R" and "3R", respectively. References to the transcript of the proceedings in the District Court are designated "Tr.". Citations to the Court of Appeals' Opinion (Appendix A hereto) will be designated "C.A. Op."

stock should be made to all of the Long Beach shareholder depositors as provided in the Long Beach Charter. The Bank Board (and the California Savings and Loan Commissioner) moved for summary judgment on the ground that the challenge to the exclusionary clauses should be rejected as a matter of law and the actions dismissed [3 R. 874, 997, 1238, 1272].

On May 17, 1965, the District Court rendered judgments which in effect granted the motions for summary judgment of Long Beach, the Shareholders' Committee, Equitable and Intervenor Ross and denied the summary judgment motions of the Bank Board and Savings and Loan Commissioner [1 R. 697; 2 R. 907; 3 R. 1642]. The District Court declared the exclusionary provisions void and ordered pro rata distribution, on the grounds, *inter alia*:

> (1) By 12 U.S.C. §1464(a), Congress required all Federal Savings and loan associations to be mutual.[9] Equality is the essence of every mutual association. The moment one group of depositors is favored and all others are excluded, the association is no longer a mutual association.

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[9]Section 1464(a) provides:

"In order to provide local *mutual* thrift institutions in which people may invest their funds and in order to provide for the financing of homes, the Board is authorized, under such rules and regulations as it may prescribe, to provide for the organization, incorporation, examination, operation and regulation of associations to be known as 'Federal Savings and Loan Associations,' and to issue charters therefor, giving primary consideration to the best practices of local *mutual* thrift and home-financing institutions in the United States." (Emphasis added).

(2) The Long Beach Charter required that each of the shareholder members of Long Beach receive his pro rata share of Equitable stock.[10]

(3) The Bank Board cannot forfeit the interests of Intervenor Ross and the other shareholder members of Long Beach by an edict issued after their deposits were made and without prior notice to said shareholder depositors at the time of their deposits.[11]

The Bank Board and Commissioner thereupon appealed from the three judgments (each judgment was substantially similar) to the Court of Appeals for the Ninth Circuit; the three appeals (Nos. 20378, 20447 and 20552) were consolidated for briefing and argument and disposed of collectively in a single opinion by the Court of Appeals. On August 18, 1967, the latter court rendered its opinion and decision to which

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[10]Section 9 of the Charter reads in pertinent part:

"9. . . . *All* holders of share accounts shall be entitled to *equal distribution* of net assets, pro rata to the value of their share accounts, in the event of voluntary or involuntary liquidation, dissolution, or winding up of the association." (Emphasis added). [Pltf. Ex. 19].

[11]The trial court also indicated that the Bank Board's approval was not required for the merger—a point to which the Court of Appeals devotes a large portion of its opinion. In our view, this question is not crucial here, since even assuming, *arguendo*, that Bank Board approval of the merger were required, this would not render the Board's action immune from effective judicial review.

A copy of the District Court Opinion is annexed as Appendix I to the companion Petition for Certiorari filed by Long Beach, *et al.*, and is also reported at 233 F. Supp. 578, *sub nom., Elliott v. Federal Home Loan Bank Board.* The judgments of the District Court, which are quite voluminous, are included in the Transcript on Appeal [1 R. 697; 2 R. 907; 3 R. 1642].

the present petition for certiorari is directed (Appendix A). (Petition for rehearing was denied January 12, 1968).

The Court of Appeals reversed the judgments below and remanded the three cases to the District Court with directions to dismiss the actions on the ground that even assuming that the District Court was correct in determining that the exclusionary provisions of the Merger Agreement were invalid, no remedy was available to Long Beach, the Shareholders' Committee or the excluded shareholders, including Intervenor Ross.

In arriving at this rather startling result—which in effect denies the federal courts' statutory power to correct unconstitutional, illegal and void administrative action—the Court of Appeals reasoned as follows:

> 1. The exclusionary provisions of the Merger Agreement cannot be stricken without setting aside the entire merger, because:
>
> (a) The merger required Bank Board (and Commissioner) approval and the merger as so approved cannot be altered by the court. Nor can the court remand the matter to the Bank Board, as the Bank Board (and Commissioner) lack power to review and consider provisions of a merger plan "except in performance of their function to approve or disapprove the merger plan as a whole" [C.A. Op. p. 20).
>
> (b) The merger required shareholder approval and any alteration would require a resubmission

to the shareholders, which would be impractical at this stage.[12]

2. The entire merger cannot be set aside because in failing to seek injunctive relief in advance of the merger, the excluded shareholders were guilty of laches.[13]

However plausible the foregoing argument might appear at first glance, on analysis we believe it is fallacious in a number of respects:[14]

1. It rests on the false premises that:

(a) The District Court was making a revised distribution plan (whereas it merely held the Charter and Acts of Congress controlling);

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[12]The District Court reasoned that the majority shareholders could not abrogate the pro rata rights of the minority and their attempt to do so was void; under this analysis, no further action of the shareholders would seem necessary once the void exclusionary clauses were stricken. Moreover, the shareholders were aware at the time they approved the merger that the right to challenge it in whole or in part existed. As the Court of Appeals itself notes (C.A. Op. p. 7): "Each favorable ballot, cast under authority of a proxy or otherwise, expressly stated that it was cast in reliance upon that portion of the new Article VII of the merger agreement which reads: 'This Agreement is not intended to prohibit any shareholder member of Long Beach from taking appropriate action to exercise such rights, if any, which he may have to contest the merits or validity of the plan of dissolution of Long Beach, or any part thereof, incorporated herein.'" [Pltf. Ex. 12/9/63-4].

[13]The Court of Appeals also suggests laches is a bar even if no setting aside of the entire merger would be required. Apparently this is based on the assumption (erroneous we believe) that shareholders' approval still would be required.

[14]While we believe the District Court was correct in rendering summary judgment in favor of the excluded shareholders, including Intervenor Ross, had the Court of Appeals merely determined it was not a proper case for summary judgment and reversed for a plenary trial, we could not in good conscience have requested a hearing before this Court. That is not, however, the nature or basis of the Court of Appeals' decision, as is apparent from its direction that the actions be dismissed.

(b) The federal courts (and the Bank Board) are without power to review or nullify an invalid provision of a merger agreement without setting aside the entire merger.

2. Conversely, it fails to give due recognition to the doctrine of severability and to the express severability clause in the Merger Agreement.

3. It misapplies the doctrine of laches.

The net effect of the foregoing errors is to:

1. Render the Bank Board largely immune from effective judicial review; and

2. Deprive the excluded shareholders of Long Beach of their pro rata share of Equitable stock without either an administrative or judicial hearing—contrary to the dictates of procedural due process.

As a result, Intervenor Ross and the many other Long Beach shareholders in the excluded categories are foreclosed from challenging what is tantamount to a forfeiture of their interests, despite the fact that:

1. They had no notice of possible exclusions at the time they made their deposits.

2. No plenary trial has been held on the validity of the exclusionary clauses in question.

3. The District Court, on motions for summary judgment, found the exclusionary clauses in excess of the Board's powers and invalid; and

4. The Court of Appeals itself did not find either the exclusionary clauses or the Bank Board's actions with respect to them valid or lawful but regarded itself as powerless to act, in the mis-

taken belief that no judicial review of the exclusionary clauses of the Merger Agreement or the Bank Board's action requiring such exclusions would lie.

**Importance of Case.**

The result reached by the Court of Appeals is not only unjust to Intervenor Ross and the other excluded shareholders of Long Beach, but establishes what we believe to be a dangerous precedent insofar as the Bank Board is concerned and one which could readily be applied to other areas of administrative action. Insofar as the Court of Appeals purports to take comfort in certain decisions of this Court, it has made, we believe, a gross misapplication of those decisions in a manner which could not have been intended and should not be sanctioned by this Court.

At the same time, it poses a dilemma to the shareholder members of a federally chartered savings and loan association. Under the reasoning of the Court of Appeals, whenever a shareholder depositor seeks to challenge the distribution provisions of a merger agreement he must—to avoid laches—seek to enjoin the merger.

Aside from other practical difficulties in launching such an attack, it would create serious and perhaps disastrous consequences for the association and all of its shareholders. By thus foreclosing any possibility of "limited war" (*i.e.*, a post-merger challenge to the distribution provisions) the decision below places the courts in a position where they must either:

1. Increase the vulnerability of mergers to shareholder attack—a course which may invite a rash of "strike suits"; or

2. Routinely reject such attacks, thereby depriving the injured shareholder of the only recourse ostensibly open to him.

Neither choice is a happy one, and an opinion which forces the courts to elect between these alternatives is, we submit, highly suspect in terms of sound judicial policy.

## Questions Presented.

This case presents questions of major importance in the area of judicial review of administrative agencies (particularly the Federal Home Loan Bank Board) and of procedural due process:

I.

DOES THE COURT OF APPEALS' OPINION UNDULY RESTRICT THE SCOPE OF JUDICIAL REVIEW OVER THE ACTIONS OF THE FEDERAL HOME LOAN BANK BOARD RESPECTING MERGERS OF FEDERALLY CHARTERED SAVINGS AND LOAN ASSOCIATIONS AND THEREBY ESTABLISH A DANGEROUS PRECEDENT IN FORECLOSING EFFECTIVE JUDICIAL REVIEW OF ADMINISTRATIVE ACTION.

A. *Does the Court's Power to Effectively Review a Merger and the Bank Board's Power to Act With Respect Thereto End Once the Merger Is Effected?*

B. *Was the Court of Appeals Correct in Holding That No Judicial Relief Was Possible From Invalid Exclusionary Clauses in a Merger Agreement Which the District Court Found to Exceed the Bank Board's Powers?*

C. *Was the Scope of Judicial Relief Available Limited to a Pre-Merger Injunction?*

D. *Did the Court of Appeals Misapply the Decisions of This Court in Federal Power Commission v. Idaho Power Co., 344 U.S. 17, 20 (1952); Aircraft & Diesel Equipment Corp. v. Hirsch, 331 U.S. 752, 767 (1947), and S.E.C. v. Chenery Corp., 318 U.S. 80, 88 (1943)?*

*Comment:*

The Court of Appeals has unduly restricted—indeed practically foreclosed—effective judicial review of the Bank Board's action in requiring what is tantamount to a forfeiture whereby certain Long Beach shareholders are excluded from receiving their pro rata share of Equitable stock.

If the Court of Appeals' opinion is permitted to stand, it will establish a dangerous precedent in an important area of administrative action.

II.

CAN MEMBERS OF A FEDERALLY CHARTERED SAVINGS AND LOAN ASSOCIATION BE DEPRIVED OF THEIR PRO RATA SHARE OF STOCK RECEIVED UPON A MERGER WITHOUT ADVANCE NOTICE, AN ADMINISTRATIVE HEARING, OR JUDICIAL REVIEW?

A. *Is Such Deprivation Consistent With the Letter or Spirit of the Federal Administrative Procedure Act or With Federal Due Process Standards?*

*Comment:*

The shareholder depositors of Long Beach were not advised at the time of their deposits that they would forfeit their pro rata interests if they pledged their accounts or deposited in excess of $10,000.

The Bank Board—without giving the excluded shareholders a hearing—has insisted on such a forfeiture and the Court of Appeals now holds that the federal courts are powerless to remedy it.

III.

MUST SHAREHOLDERS WHO WISH TO CHALLENGE EXCLUSIONARY CLAUSES OF A MERGER AGREEMENT SEEK TO ENJOIN OR SET ASIDE THE ENTIRE MERGER DESPITE AN EXPRESS SEVERABILITY CLAUSE?

IV.

WAS THE COURT OF APPEALS CORRECT IN HOLDING THAT THE BANK BOARD, AS WELL AS THE FEDERAL COURTS, WAS POWERLESS TO REMEDY THE INVALID EXCLUSIONARY CLAUSES ONCE THE MERGER HAD BEEN APPROVED AND CONSUMMATED?

## REASONS FOR GRANTING THE WRIT.

### I.

### The Court of Appeals' Opinion Establishes a Dangerous and Erroneous Precedent in Foreclosing Effective Judicial Review in an Important Area of Administrative Action.

Recent opinions of this Court have reflected an acute awareness of the dangers of administrative absolutism and the corresponding need to enforce meaningful controls.

*Abbott Laboratories v. Gardner,* 387 U.S. 136 (1967);

*National Labor Relations Board v. Brown,* 380 U.S. 278, 291-292 (1965);

*Harmon v. Brucker,* 355 U.S. 579, 581-582 (1958).

The same philosophy is reflected in the Federal Administrative Procedure Act, 5 U.S.C. §§551 *et seq.* (former §§ 1001 *et seq.*).

The Court of Appeals' opinion runs counter to this trend of authority by rendering an important administrative agency—the Federal Home Loan Bank Board—largely immune from judicial scrutiny.

Under the Court of Appeals' opinion, the only effective attack on an invalid exclusionary clause in the distribution provisions of a merger agreement is a challenge to the entire merger prior to its consummation by means of a suit for injunctive relief.

Once the merger is consummated there can be no partial nullification, while a setting aside of the merger in its entirety will be barred by laches and the practical difficulties such an undertaking would entail.

This is so in the present case, says the Court of Appeals, even though the Merger Agreement itself expressly provides:

> "This Agreement is not intended to prohibit any shareholder member of Long Beach from taking appropriate action to exercise such rights, if any, which he may have to contest the merits or validity of the plan of dissolution of Long Beach, *or any part thereof,* incorporated herein." (Emphasis added).
>
> *233 F. Supp. 586.*

The action for injunctive relief which the Court of Appeals recommends is in most cases hardly a meaningful or effective remedy, as the present case amply demonstrates:

1. A challenge to the merger and the delay thereby entailed might well jeopardize the association and all its shareholders. Such action—which at best would be financially hazardous and at worst conducive to "strike suits" (see *Cohen v. Beneficial Industrial Loan Corp.,* 337 U.S. 541 (1949)) —is hardly to be commended. In effect the excluded shareholder is forced to adopt a "dog in the manger" attitude. Permitting a post-merger challenge to the exclusions would entail a more realistic and less destructive approach. Yet the Court of Appeals in effect forecloses such a middle course.

2. The plaintiffs in such an injunction suit normally would be required to post a huge undertaking as a condition of interim relief. For example, in the present case, the combined assets of Equitable and Long Beach at the time of the mer-

ger amounted to well over $150,000,000.00 [Pltf. Ex. 12/9/63-10A p. 43]. An injunction bond (F.R.C.P. §65(c)) to indemnify the thousands of Long Beach depositors and Equitable depositors and shareholders against the millions of dollars potential damage which might be sustained in the course of a lengthy lawsuit, if the injunction proved wrongful, would be beyond the capability of any shareholder or shareholder group. The suggested remedy of injunction is therefore an illusory one.

3. The District Court itself is placed in a procedural straight jacket and forced to choose between two highly undesirable alternatives without being able to adopt a feasible middle course. This runs counter to the philosophy recently enunciated by this Court in *J. I. Case Co. v. Borak*, 377 U.S. 426 (1964), where the Court stresses the need for a flexible approach in tailoring remedies to meet the needs of a particular case.

The only practical alternative is to permit a post-merger challenge to the invalid exclusionary provisions.

Such a challenge—and the possible resulting holding of invalidity—does not do violence to the concept of administrative approval, particularly where, as here, the administrative agency in question (the Bank Board) has overstepped its jurisdiction by inserting invalid exclusionary clauses in excess of its authority.[15] The

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[15]For example, suppose that instead of excluding pledged accounts the Bank Board had required the Merger Agreement to provide for exclusion of members of a particular ethnic, religious or racial group. Can anyone doubt that such a provision could and should be stricken by the Court whether or not it struck down the remainder of the merger?

addition of such invalid provisions—outside the scope of the Board's authority[16]—should properly be regarded as a nullity.

Recognition of such partial invalidity would be consistent with the terms of the Merger Agreement and with the dictates of sound policy, insofar as it would make for effective review of the Bank Board's action. Such effective review appears contemplated by the Federal Administrative Procedure Act. Thus, 5 U.S.C. §§ 704 and 706 (formerly §§ 1009(c) and (e)) provide in pertinent part:

> "Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. . . ." (5 U.S.C. § 704)
>
> "To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—
>
> "(1) compel agency action unlawfully withheld or unreasonably delayed; and
>
> "(2) hold unlawful and set aside agency action, findings, and conclusions found to be—
>
> "(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> "(B) contrary to constitutional right, power, privilege, or immunity;

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[16]In view of the approach adopted by the Court of Appeals, it must be assumed here, as it was by the Court of Appeals, that the exclusionary provisions were invalid, as found by the District Court.

"(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

"(D) without observance of procedure required by law; . . ." (5 U.S.C. § 706)

The District Court itself noted the pertinence of the Administrative Procedure Act:

> "The Administrative Procedure Act is applicable to the Bank Board, and its actions are judicially reviewable, and it does not have 'uncontrolled discretion.' [Home Loan Bank Board et al. v. Mallonee (9 Cir. 1952) 196 F. 2d 336, Cert. den. Mallonee v. Fahey, 345 U.S. 952, 73 S.Ct. 863, 97 L.Ed. 1374; Federal Home Loan Bank Board v. Long Beach Federal Savings & Loan Association (9 Cir. 1961) 295 F.2d 403]. That being so, the Plaintiff Equitable and each of the Cross-claimants and intervenors have standing to sue, and this court has jurisdiction of defendants Bank Board and Federal Savings and Loan Insurance Corporation under the terms of Section 10 of the Administrative Procedure Act [5 U.S.C. §1009], particularly subdivision (c) thereof which provides that: 'every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review.'" 233 F. Supp. at 588.

Nor was the District Court contriving a "revised distribution plan," as the Court of Appeals suggests (C.A. Op. p. 17). The District Court was merely enforcing the terms of the Long Beach Charter and the mandate of Congress, both of which were deemed to require pro rata distribution of the Equitable stock among the Long Beach depositors.

In holding to the contrary, the Court of Appeals relies on three decisions of this Court which we believe to have been misapplied here, namely:

*Federal Power Commission v. Idaho Power Co.*, 344 U.S. 17, 20 (1952);

*Aircraft & Diesel Equipment Corp. v. Hirsch*, 331 U.S. 752, 767 (1947); and

*S.E.C. v. Chenery Corp.*, 318 U.S. 80, 88 (1943).[17]

*S.E.C. v. Chenery*, 318 U.S. 80, *supra*, involved proceedings to review an order of the Securities and Exchange Commission approving a plan of reorganization for a Public Utility Holding Company whereby certain preferred stock was not permitted to participate on an equal footing with other preferred stock. The Court, in holding the order erroneous, refused to sustain it on the basis of determinations which the agency alone could have made but which it had not in fact made. Since the agency purported to base its action on judicial doctrines, it was held that its actions must be so judged on review, and judged by those standards the Court concluded the agency was in error.

Neither the result reached in *Chenery* nor the Court's reasoning in that case would appear to sanction the course followed by the Court of Appeals here.

In *Federal Power Commission v. Idaho Power Company*, 344 U.S. 17, *supra*, the Federal Power Com-

[17]In view of the approach adopted by the Court of Appeals, it must be assumed here, as it was by the Court of Appeals, that the exclusionary provisions were invalid, as found by the District Court.

mission had authorized a hydro-electric project on condition the licensee permit use of its electric lines by the United States. The Court of Appeals held the Commission had no authority to attach such a condition and ordered it stricken. In declaring this erroneous, the Court stated that the function of the reviewing court ended when an error of law was laid bare and that the court should then have remanded the case to the Commission for reconsideration.[18]

In the present case, the Court of Appeals did not direct that the case be remanded to the Bank Board for reconsideration. In fact, it *held the Board powerless to take any further action.*

Moreover, the Court of Appeals apparently overlooked a crucial passage in the *Idaho Power* case wherein *the Court distinguished such a situation as that presented by the instant case* with the following observation:

> ". . . There doubtless may be situations *where the provision excised from the administrative order is separable from the remaining parts or so minor as to make remand inappropriate. . . .*" 344 U.S. at page 20. (Emphasis added).

In view of the express severability clause in the present case, the District Court's action appears to fall squarely within the above language.

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[18]The Court went on to review the merits of the Commission's action and found it proper.

*Aircraft & Diesel Equipment Corp. v. Hirsch,* the third case relied on by the Court of Appeals, merely involved a failure to exhaust administrative remedies under the Renegotiation Acts.[19]

II.

**The Excluded Shareholder Members of Long Beach, Including Intervenor Ross, Have Been Deprived of Procedural Due Process.**

The Court of Appeals has rendered an opinion which is inconsistent with the demands of procedural due process.

As a result of the Court of Appeals' opinion, numerous shareholder members of Long Beach, including Intervenor Ross, are excluded from obtaining their pro rata share of Equitable stock despite the fact that:

1 The Long Beach shareholders were not notified at the time of their deposits that in the event of a merger they would not receive their pro rata share in accordance with the mutual nature of the Association and the provisions of the Long Beach Charter noted above.

2. The Bank Board did not hold any hearings at which findings were made to justify exclusion

[19]The Court of Appeals also cites *Fascination, Inc. v. Hoover* (1952), 39 Cal. 2d 260, 246 P. 2d 656 where the court ordered a business license issued to plaintiff by certain city officials. The California Supreme Court held that while the administrative agencies involved had acted erroneously in proceeding without a required hearing, since the matter was one entrusted to administrative decision the court should have remanded the matter to the agency for further and proper proceedings rather than finally disposing of it on its merits. In the present case, the District Court found that the Bank Board had not merely proceeded in an irregular fashion in dealing with a matter committed to its discretion, but *had acted beyond its authority* insofar as the exclusionary clauses were concerned. Moreover, the Court of Appeals did not direct a remand to the Bank Board but ordered the actions dismissed.

of certain of the shareholder members of Long Beach.

3. No plenary trial has been held in the District Court to test the Board's action, while the Court of Appeals itself assumes for purposes of its decision that the exclusionary clauses were invalid.

In short, a large group of shareholder depositors have been deprived of valuable property interests without any opportunity for either an administrative or court hearing.

Such deprivation is particularly unjust in the case of Intervenor Ross, who intervened in these proceedings some four years ago for the very purpose of insuring that he would not be subjected to the forfeiture which the Bank Board sought to impose until he had had his day in court, including an opportunity to present the facts and circumstances which rendered the Bank Board's action arbitrary and oppressive as to him. He has never had an opportunity to make that presentation. Under the Court of Appeals' opinion he will be forever barred from doing so while suffering what is tantamount to forfeiture of his pro rata share of Equitable stock.

The Court of Appeals seeks to explain this manifestly unjust result on the ground that the excluded shareholder members should have sought to enjoin the entire merger and are therefore barred by laches.[20]

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[20]Even assuming—which we do not concede—that the laches question might otherwise be dispositive of the case, the excluded shareholders have *never been afforded an opportunity for a plenary trial on this issue*, the Court of Appeals having sustained this defense (contrary to the trial court's judgment) as a matter of law.

Yet, as noted above, a pre-merger attack would not have afforded a practical alternative.[21]

Moreover, by the express terms of the Merger Agreement, the excluded shareholder members were led to believe that their right to challenge the exclusionary clauses would be preserved. Thus, the Merger Agreement recites:

> "This Agreement is not intended to prohibit any shareholder member of Long Beach from taking appropriate action to exercise such rights, if any, which he may have to contest the merits or validity of the plan of dissolution of Long

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[21]The Court of Appeals notes (C.A. Op. p. 17, footnote 28):

> "Another possible remedy might have been the assertion of appraisal rights by aggrieved shareholders. Again, however, the complaints in the actions before us do not request such relief."

As noted in a Petition for Rehearing filed in the Court of Appeals (and conceded by the Bank Board at pages 6-7 of its Response to said Petition), the terms of the Merger Agreement expressly prohibit resort to the appraisal rights conferred by California Corporations Code, Sections 4300, *et seq.*, even assuming, *arguendo*, that the California appraisal statute might otherwise be applicable to a federal mutual savings association. Article VIII of the Merger Agreement contains the following provision:

> "3. Any dissenting shareholder of Long Beach and any dissenting stockholder of Equitable will have the rights provided in the Corporations Code of the State of California, Section 4300, et seq., which reads in part:
>
> '. . . The fair market value shall be determined as of the day before the vote of the shareholders approving the agreement of merger or consolidation, excluding any appreciation or depreciation in consequence of the proposed action'; *provided, however, Long Beach dissenting shareholders shall be limited to those having participation rights and then only to the extent of such rights.*" (Emphasis added). [Pltf. Ex. 12/9/63-10A, p. 48].

> Beach, or *any part thereof,* incorporated herein." (Emphasis added) [Pltf. Ex. 12/9/63-10A, p. 47].[22]

In effect the Court of Appeals reads into the above-quoted clause from the Merger Agreement the condition that such challenge must be made prior to the merger. Yet the clause itself contains no such limitation. Can it be doubted that any pre-merger challenge would have been met with the argument that it was premature in view of the express preservation of rights in the Merger Agreement?

That the shareholders acted promptly in seeking judicial relief once the merger was consummated cannot admit of doubt. As the Court of Appeals notes (C.A. Op. pp. 7-8): the merger was not consummated until September 10, 1963; two of the present lawsuits were instituted *that very day* and the third a week later.

Nor was the Bank Board, the Commissioner or anyone else misled in any respect. Certainly at the time the merger was consummated it was anticipated that a challenge would be made to the exclusionary clauses, which is precisely what occurred.

If anyone is to blame for the post-merger challenge (and we do not suggest anyone is), it is the Bank Board, which permitted the merger to go forward when it knew or should have known that a post-merger challenge was to be made.

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[22]The United States District Court found in its opinion (233 F. Supp. 578 at 596):

> "The Bank Board . . . agreed to the insertion of the provision that the validity of *any part* of the Agreement could be contested." (Emphasis by the Court).

Under such circumstances, it is strange to find the Court of Appeals condemning the excluded shareholders for "laches".

The net result—depriving the excluded shareholders of any opportunity for a hearing or redress—is hardly consistent with the demands of procedural due process as guaranteed by the Fifth Amendment.

## Conclusion.

The present case presents important questions in the area of judicial review of administrative agencies. The opinion of the Court of Appeals, if permitted to stand, will preclude effective review of the actions of the Federal Home Loan Bank Board and, by analogy, of other agencies as well. Moreover, in holding that the shareholder depositors of Long Beach may be deprived of their pro rata share of assets without a judicial or administrative hearing, the court has reached a result at variance with the dictates of procedural due process.

In order that these unfortunate results may be corrected and appropriate criteria laid down to govern this important area of law, we respectfully request that the within Petition be granted.

Respectfully submitted,

HARVEY M. GROSSMAN,
*Attorney for Petitioner,*
*N. Joseph Ross.*

*Of Counsel:*

PACHT, ROSS, WARNE, BERNHARD
& SEARS

# APPENDIX A.

## Court of Appeals.

### Opinions, Judgments and Order Denying Rehearing.

(Note: The Opinion of the District Court is reported at 233 F. Supp. 578 and annexed as Appendix I to the companion Petition for Certiorari being filed by Long Beach Federal Savings and Loan Association, et al.)

# UNITED STATES COURT OF APPEALS
# FOR THE NINTH CIRCUIT

FEDERAL HOME LOAN BANK BOARD, a sue and be sued agency of the United States; FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, a sue and be sued Federal corporation, and agency of the United States,
*Appellants,*

vs.

SIDNEY ELLIOTT, WINNIE BUCKLIN, MABEL FERGUS and JOHN (BEANS) REARDON, individually and as the Shareholders' Protective Committee of Long Beach Federal Savings and Loan Association, suing on behalf of all of the savings shareholders of said Association as a class; and LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION, a Federal mutual savings and loan association,
*Appellees.*

No. 20,378

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FEDERAL HOME LOAN BANK BOARD, a sue and be sued agency of the United States; FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, a sue and be sued Federal corporation; EQUITABLE SAVINGS AND LOAN ASSOCIATION, a California corporation; LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION, a Federal mutual association; JOHN DOES 1 through 70,000,
*Appellants,*

vs.

SIDNEY ELLIOTT, WINNIE BUCKLIN, MABEL FERGUS and JOHN (BEANS) REARDON, individually and as the Shareholders' Protective Committee of Long Beach Federal Savings and Loan Association, suing on behalf of all of the savings shareholders of said Association as a class,
*Appellees.*

No. 20,447

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FEDERAL HOME LOAN BANK BOARD, a sue and be sued agency of the United States; FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, a sue and be sued Federal corporation and agency of the United States; LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION, a Federal mutual association; JOSEPH FIELDS, a citizen of New York; MARION FIELDS, a citizen of New York; RALPH FIELDS, a citizen of New York; JOHN DOES 1 through 70,000,
*Appellants,*

vs.

EQUITABLE SAVINGS AND LOAN ASSOCIATION, a California corporation,
*Appellee.*

No. 20,522

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[August 18, 1967]

Appeal from the United States District Court
for the Southern District of California,
Central Division

Before: BARNES, HAMLEY and DUNIWAY, Circuit Judges

HAMLEY, Circuit Judge:

Three appeals have been consolidated for disposition under the above caption. They bring into question summary judgments, entered in three cases involving the merger of Long Beach Federal Savings and Loan Association (Long Beach), and Equitable Savings and Loan Association (Equitable). The effect of each judgment is to declare invalid the formula set forth in the merger agreement governing the distribution of Equitable's guarantee stock to Long Beach shareholders, and to substitute another basis upon which such distribution would be made. The district court opinion is reported. *Elliott v. Federal Home Loan Bank Board*, D.C.S.D. Cal., 233 F.Supp. 578.

We first state the underlying facts substantially as set forth in the Board's brief on this appeal.

Long Beach was chartered as a Federal Mutual Savings and Loan Association on July 10, 1934, under the Federal Home Loan Bank Act, 47 Stat. 725 et seq. (1932), as amended 12 U.S.C. § 1421 et seq. (1964).[1] In 1946, and again in 1960, the Federal Home Loan Bank Board (Board) determined that Long Beach had engaged in certain unsound financial operations. Proceeding under sections 1 et seq. of the Home Owners' Loan Act of 1933, 48 Stat. 128, as amended, 12 U.S.C. § 1461 et seq. (1964), the Board took over the management of Long Beach on both occasions.[2]

On February 14, 1962, a settlement agreement was entered into by and among Long Beach, the Board, and Federal Savings

[1]The first charter was replaced by a second charter on July 10, 1937.

[2]These take-overs and related actions resulted in extensive federal litigation which has many times been before this court and the United States Supreme Court. See *Elliott v. Federal Home Loan Bank Board*, 233 F.Supp. 578, 584, n. 1, for a comprehensive list of previous court decisions. In addition to the three appeals dealt with in this opinion, nineteen other appeals and a writ proceeding related to this general controversy are now pending in this court, and still other proceedings are in progress in the district court.

and Loan Insurance Corporation (Insurance Corporation), providing for the dismissal of all then pending litigation between those parties, and for the return of Long Beach to its private management.

Under the terms of the settlement agreement, Long Beach was given the right, if it so chose, to liquidate pursuant to a specific plan set forth in Article XV of that agreement. This plan provided for the transfer of Long Beach savings accounts to Equitable, a California state guarantee stock company. Under the agreement Equitable would, in turn, assume the liability associated with these transferred accounts. In consideration of such assumption of liability, Long Beach would transfer to Equitable an equal amount of Long Beach assets. The remaining assets of Long Beach, after payment or provision for payment of creditor claims, would be distributed to Long Beach shareholders on a pro rata basis.

Pursuant to the settlement agreement, Long Beach was returned to its private management on April 2, 1962. At that time, savings (share) accounts in Long Beach aggregated about $30,500,000. On the day of the return, April 2, approximately $24,000,000 were deposited in Long Beach, and on succeeding days until November, 1962, there were substantial additional deposits.[3]

In the meantime, in May, 1962, Long Beach management had informally submitted to the Board a proposed plan of merger between Long Beach and Equitable. This merger plan differed in substantial respects from the liquidation plan set out in Article XV of the settlement agreement. Under the merger plan, all, and not part, of Long Beach's assets and liabilities were to be transferred to Equitable. Under the merger, Long Beach shareholders would then receive payment for the value of Long Beach as a going concern by way of distribution to them of Equitable guarantee stock, not from the proceeds of the liquidation of Long Beach assets as provided in Article XV of the settlement agreement.

Because of the substantial differences between the two plans, Long Beach sought Board approval of the merger agreement con-

[3]As of April 30, 1962, Long Beach savings accounts had climbed to about $65,800,000. From then until November 30, 1962, the net increase in savings accounts was approximately $5,700,000, bringing the total of all accounts to about $71,500,000 on that date.

taining the new distribution terms. The two parties carried on negotiations as to the proposed merger from May, 1962, to June, 1963. At the same time, Long Beach also sought the approval of the Savings and Loan Commissioner of the State of California (Commissioner).

In early July, 1962, while negotiations were proceeding in connection with the merger proposal, Thomas A. Gregory, president of, and principal negotiator for, Long Beach,[4] advised the Board that large withdrawals had been made from Long Beach after the payment of the June 30, 1962 dividend.

At the Board's request, Gregory submitted a list of accounts of $100,000 or over which had been opened at Long Beach on and after April 2, 1962, the date of Long Beach's return to private management. This list showed that seventy-seven such accounts, totalling in the aggregate about $20,500,000, had been opened, according to Gregory's characterization, by "celebrities of the financial and entertainment world widely known for their great wealth and business acumen."[5] There was also a dramatic increase in the number of large new accounts ranging from $20,000 to $100,000.[6] Approximately $10,000,000 of the $100,000 plus accounts were withdrawn after the June 30, 1962 dividend.

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[4]During this period of merger negotiations, Gregory was also the beneficial owner of a substantial block of Equitable stock. As late as June 20, 1963, his name was carried on Equitable's stationery as vice-president.

[5]This increase in the number of large deposits was a marked change from the situation that existed on April 22, 1960, when Long Beach was taken over by the Board. At that time Long Beach, with savings accounts of approximately $96,000,000, had only one account in excess of $100,000.

[6]In April, 1960, there was only one account in the $75,000 to $100,000 range. During the period between April 2, 1962, and November 30, 1962, there were six such accounts, none of the owners of which had previously been Long Beach shareholders. In April, 1960, there were no accounts in the range of $50,000 to $75,000. In the 1962 period referred to above, there were thirty-four such accounts, only two of which were owned by previous Long Beach shareholders. In April, 1960, there were thirty-three accounts on deposit in the range from $20,000 to $50,000. In the 1962 period, there were 124 such accounts, only eighteen of which were owned by previous Long Beach shareholders.

A later analysis of Long Beach accounts which *increased* by $10,000 or more between April 2 and November 30, 1963, revealed equally marked contrasts in the $20,000 to $100,000 range.

This influx of large accounts into Long Beach, most of which were opened by persons having no prior connection with Long Beach, was of grave concern to the Board. In the Board's view, disputed by Long Beach, the necessary net effect of this influx of new money, most of it borrowed for the purpose,[7] was to dilute the interests of the small and regular shareholders in the Long Beach net worth in the event of liquidation or merger.[8]

During the negotiations for approval of the merger plan, the Board took the position that, in permitting such a tremendous influx of new money of this sort, Long Beach management had breached its fiduciary duty by allowing these new large depositors to share in Long Beach's net worth.[9] The Board therefore indicated that it would not approve a pro rata distribution of Equitable stock to Long Beach shareholders. The Board reasoned that to allow the new large depositors to share in a pro rata distribution would have permitted these depositors to share in Long Beach's net worth to which, in the Board's view, they had contributed nothing.

Long Beach, on the other hand, took the position that there was no breach of fiduciary duty and that it needed all these deposits

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[7]Of the aggregate of more than $28,000,000 in accounts which had been increased by $10,000 or more between April 2, 1962, and November 30, 1962, over $12,000,000 of such accounts were pledged as of November 30, 1962, to secure loans. The proceeds of most of these loans had been deposited in Long Beach. The principal pledgee of these accounts was the City National Bank of Beverly Hills which, as of November 30, 1962, had outstanding loans of over $8,000,000, the proceeds of which had been deposited in Long Beach. Mr. Hart, the President of the City National Bank, was a substantial stockholder in Equitable, as was one of its other officers, Curtis Palmer.

[8]The Board also argued that, because of this sudden and large inflow, Long Beach was in no position to invest the new money quickly, yet had to pay a dividend to the new savers ranging from 4.5 percent to 4.8 percent. Consequently, Long Beach operated at a loss of over $100,000 per month during the period from January 1, 1963 to September 10, 1963, and this development in turn resulted in a substantial reduction in net worth.

[9]Under sections 6(e) and (f) of the Long Beach by-laws, management had the power to prevent such an influx by limiting share payments which could be accepted, or by rejecting any application for a share account.

to maintain a secure position.[10] Long Beach also held the view that while losses were necessarily sustained in holding such large sums under certificates of deposit while paying a dividend thereon, this was necessary to provide adequate liquid assets to accommodate any possible future run on Long Beach.[11] In addition, Long Beach asserted that the influx of new savings deposits actually conferred major benefits.[12]

As an outgrowth of these conflicting views, Long Beach and Equitable agreed to insert in the merger agreement the distribution provisions here in question. In effect, these distribution provisions, set forth in Articles VII and VIII of the merger agreement, denied participation rights in the distributable Equitable

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[10]In its proposed finding of fact No. 28, Long Beach stated:

"28. In March-April, 1962, Long Beach Federal's officers and its Shareholders' Protective Committee wished to rehabilitate the precarious financial condition of the seized Association. They felt substantial new savings deposits were urgently and immediately required for such rehabilitation. The first few days of the restored Association upon its return to its founding management were believed to be the most critical time."

[11]Long Beach had lost $10,000,000 of its savings deposits in a run of withdrawals, following the Board's 1946 seizure of Long Beach. It had similarly lost $69,000,000 in 1960, reducing Long Beach's then total of savings deposits from over $96,000,000 to about $28,000,000.

[12]As stated in its opening brief on these appeals, Long Beach believes that the deposit of these additional sums were beneficial in the following respects:

"(a) Equitable paid $3,000,000 in guarantee stock for the goodwill of the restored Association. Said goodwill resulted solely from the new $42,000,000 of savings deposits.

"(b) The additional $3,000,000 to be impounded for 10 years was released for immediate distribution among the Long Beach Federal depositors. Equitable's assumption of all Long Beach Federal liabilities, known as well as unknown, made this release possible.

"(c) Approximately $3,884,000 of possible income taxes were saved. The $42,000,000 in new savings deposits under 26 U.S.C. 593 created a tax shelter of 12% or about $5,000,000. This tax shelter enabled Long Beach Federal to received [sic] the $5,000,000 compensation paid it by appellants Bank Board and Insurance Corporation as damages, tax free. The $5,000,000 tax shelter also enabled Long Beach Federal to transfer its surplus to Equitable without taxes which might otherwise have wiped out the distribution." (Record references and footnotes omitted.)

In its reply brief the Board took issue with all of these assertions.

guarantee stock to the extent that new accounts, or additions to April 22, 1960 account balances, exceeded $10,000, and with respect to pledged accounts to the extent of the pledge.[13] In addition, these provisions restricted obvious "insiders" from participating in the distribution except to the extent of their April 22, 1960, account balances.

The merger agreement, with the restrictive distribution provisions included, was executed by Long Beach and Equitable on June 12, 1963. The Board conditionally approved it on June 14, 1963, the conditions being formal and technical. The Long Beach management shortly thereafter mailed a proxy statement, including copies of the merger agreement, to its members with its covering letter of June 17, 1963.

The Long Beach members approved the merger agreement overwhelmingly at their meeting on July 6, 1963. Ninety-six percent of all the votes cast for the merger at that meeting were cast by the Shareholders' Protective Committee of Long Beach Federal Savings and Loan Association (Committee).[14] Each favorable ballot, cast under authority of a proxy or otherwise, expressly stated that it was cast in reliance upon that portion of the new Article VII of the merger agreement which reads:

> "This Agreement is not intended to prohibit any shareholder member of Long Beach from taking appropriate action to exercise such rights, if any, which he may have to contest the merits or validity of the plan of dissolution of Long Beach, or any part thereof, incorporated herein."

The Equitable stockholders voted their approval on July 13, 1963. The Commissioner granted his approval on August 28, 1963. The Board's final approval was given on September 5, 1963. On September 10, 1963, the merger was consummated by filing the

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[13]April 22, 1960 is the date upon which Long Beach was seized for the second time by the Board. The $10,000 figure was selected because the Board believed that new accounts would generally not be opened by bona fide savers in amounts larger than the then maximum amount of $10,000 federal account insurance for any one account.

[14]This is a committee of Long Beach savings depositors formed in 1946. The Committee has, since then, continuously engaged in litigation concerning the affairs of Long Beach, particularly Long Beach's controversy with the Board.

merger agreement with the Secretary of State of the State of California.

Up to that time, no proceedings had been instituted to enjoin or otherwise test the validity of the merger agreement or any of its provisions. However, on September 10, 1963, the date upon which the merger agreement was consummated, two actions were commenced having this object in view. On September 17, 1963, a third action was filed having the same general objective. These are the three actions in which the summary judgments now under review were entered.[15]

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[15]The first of these actions (No. 63-1072 PH), described as one to quiet title and for declaratory relief, was brought in the United States District Court, Southern District of California, Central Division, (now Central District) by Long Beach and four individuals constituting the Committee, the latter suing as individuals, as the Committee and as representatives of the entire class of Long Beach shareholders.

The Insurance Corporation, organized pursuant to section 402 of the National Housing Act, 48 Stat. 1256 (1934), 12 U.S.C. § 1725 (1964), is an agency of the United States. Because of its identity of interest with that of the Board, we will not hereafter make separate reference to the Insurance Corporation.

The second action, which was also one to quiet title and obtain declaratory relief, was filed in the California Superior Court by the same individuals, suing in the same capacity as were plaintiffs in the district court action filed on the same day. The defendants in this action are the Board, Equitable, Long Beach and "John Does 1 through 70,000." On October 10, 1963, the Board removed this action to the district court, where it was docketed as No. 63-1230 PH.

The third action (No. 63-1107 PH) was filed in the district court by Equitable against the Committee, the Board, Long Beach and some individual Long Beach shareholders. This action was described as one in interpleader and for declaratory relief. At the time it commenced this action, Equitable deposited with the clerk of the district court the 791,650 shares of its guarantee stock which, under the terms of the merger agreement, it was contractually obligated to distribute to Long Beach shareholders.

During the course of the trial court proceedings, the Commissioner was added as a party defendant in Civil Actions Nos. 63-1107 PH and 63-1230 PH. Equitable was added as a party defendant in Civil Action No. 63-1072 PH. The Commissioner moved to dismiss the two actions in which he had been added as a party, challenging the district court's jurisdiction on the ground of sovereign immunity. The Board contended that the Commissioner was an indispensable party in all three actions and that if he was not subject to the jurisdiction of the district court, the actions must be dismissed. The trial court denied the two motions to dismiss filed by the Commissioner.

The basic issue in each of these cases is the validity of the restrictive distribution provisions of Articles VII and VIII of the merger agreement. Long Beach, the Committee, and Equitable took the position that the provisions were invalid. The Board and the Commissioner contended that they were valid.

On October 28, 1963, a stipulation was entered into by the parties and approved by the court authorizing distribution of 585,821 of the 791,650 shares of Equitable guarantee stock. This distribution was to be made to former Long Beach shareholders to the extent that their accounts were unaffected by the restrictive distribution provisions of the merger agreement. The district court order effectuating the terms of the stipulation became effective on December 10, 1963. The ownership of 205,829 shares of Equitable stock remained in dispute.

Further pleadings were filed in the three cases and some discovery was had. Several joint pre-trial hearings were conducted and an order was entered consolidating the three cases for pre-trial and trial purposes. The parties then complied with the court's direction to file cross-motions for summary judgment.

The Committee, Long Beach and Equitable joined in a motion for a summary judgment declaring invalid the restrictive distribution provisions of Articles VII and VIII of the merger agreement, and requiring the distribution of Equitable's guarantee stock to be on a pro rata basis. The Board and the Commissioner moved for summary judgments dismissing the actions.

Pursuant to its memorandum opinion, findings of fact and conclusions of law, the district court entered summary judgments for the Committee, Long Beach and Equitable. 233 F.Supp. 578. The principal effects of the judgments are to declare invalid the restrictive distribution provisions contained in Articles VII and VIII of the merger agreement, and to require a pro rata distribution of Equitable guarantee stock to all eligible holders of Long Beach share accounts.[16]

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[16]By "pro rata" distribution, the court meant that each "eligible holder of share accounts" of Long Beach is the owner of that number of the 791,650 shares of Equitable guarantee stock which is pro rata in proportion that the "eligible balance" of each eligible holder of share accounts, respectively, bore to the aggregate total of all eligible share accounts in Long Beach immediately prior to the consummation of the

The Board and the Commissioner have appealed.[17] They advance a number of arguments for reversal. We will consider first their argument that the district court was without power to change the terms of the merger plan by setting aside the restrictive distribution provisions contained in Articles VII and VIII of the merger agreement and substituting the pro rata distribution provisions set forth in the judgments.

The restrictive distribution provisions, set out in Articles VII and VIII of the merger agreement, had been approved by the Board and by the Commissioner. The district court determined that these distribution provisions were invalid. However, it did not set aside the merger.[18] Instead, the court formulated and compelled application of new merger provisions calling for a pro rata distribution of Equitable's guarantee stock. These new provisions have never been approved by the Board or the Commissioner. The Board and Commissioner contend that the district court was without power to make and enforce these changes in the merger agreement which had not been approved by the Board and Commissioner.

With reference to the need for obtaining Board approval of the merger agreement, section 5(d) of the Home Owner's Loan Act of 1933, 48 Stat. 133, 12 U.S.C. § 1464(d)(2) (1964), provides in part that the Board shall have the power to make rules and regulations ". . . for the reorganization, merger, and liquidation of

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merger agreement at 8:30 a.m. on September 10, 1963, less costs and attorneys' fees which might be thereafter allowed.

The judgments provide that the words "eligible holder of share accounts" mean a depositor having an account or accounts and holding a regularly issued pass book immediately prior to 8:30 a.m. on September 10, 1963. The judgments also provide, with an exception not here relevant, that the words "eligible balance" mean the amount of each such share-account of each eligible holder of share account or accounts, as of the close of business on November 30, 1962, less withdrawals from such account or accounts after November 30, 1962, and immediately prior to 8:30 a.m. on September 10, 1963, the last-in first-out rule being applied to such withdrawals.

[17]This court granted a stay of compliance with the district court's judgment pending disposition of the appeal.

[18]We will discuss below the question of whether, under the circumstances which confronted the court, it could have set aside the merger.

Federal associations. . . ."[19] Regulations governing the merger, dissolution, reorganization, and conversion of Federal associations are set out in 12 C.F.R. § 546 (Rev. as of January 1, 1963). Although one paragraph of that section (546.2) deals with the merger of two or more associations, and provides that such a merger shall not be effective unless and until approved by the Board, that particular paragraph does not apply where, as here, a state-chartered institution is to be the resulting association.

However, another paragraph of that section (546.4), dealing with the voluntary dissolution of federal associations, also requires prior approval by the Board. Although the transaction in question is not solely a voluntary dissolution of Long Beach, it does contemplate Long Beach's ultimate and voluntary dissolution. The Board and Long Beach, apparently regarding section 546.4 as the most nearly applicable Board regulation, employed that section as the regulatory channel through which the merger should be processed.

Thus Long Beach, on June 11, 1962, submitted to the Board an application for "dissolution by merger" with Equitable ". . . in accordance with Section 546.4 of the Rules and Regulations. . . ." Pursuant to the same regulation, the Board granted its approval after certain changes were made in the merger agreement, including the insertion of the restrictive distribution provisions embodied in Articles VII and VIII of the merger agreement. Neither in the administrative proceedings nor in the district court proceedings, did any party contend that 12 C.F.R. § 546.4, with its Board approval requirement, was inapplicable to this transaction.

It would therefore appear that, under section 5 (d) of the Home Owner's Loan Act of 1933, and 12 C.F.R. § 546.4, no merger between Long Beach and Equitable, contemplating the survival of Equitable, could be effectuated except under terms and conditions approved by the Board.

The district court held, however, that despite this statute and regulation, Board approval was not required. The court so ruled

[19]Under section 2(d) of that act, 12 U.S.C. § 1462(d) (1964), the term "association" is defined as a Federal Savings and Loan Association chartered by the Board as provided in section 5 of the act, 12 U.S.C. § 1464.

on the ground that the transaction was actually consummated under the second unnumbered paragraph of section 5(i) of the Home Owner's Loan Act of 1933, 12 U.S.C. § 1464(i), which section does not require Board approval. See 233 F.Supp. at 592.

The court reached this conclusion after analyzing the second and third unnumbered paragraphs of section 5(i) of the Act. The second unnumbered paragraph, which does *not* require Board approval, provides for conversion of a federal savings and loan association to a state savings and loan association upon the vote of not less than fifty-one percent of the shareholders voting at a meeting specially called for that purpose, provided certain conditions set forth in that paragraph of that statute have been fulfilled. On the other hand the third unnumbered paragraph of section 5(i), which *does* require Board approval, does not require approval by vote of the shareholders.

The district court reasoned that since the Board required approval of a majority of the shareholders at a meeting specially called for that purpose, the Board must have been proceeding under the second unnumbered paragraph of section 5(i), which does not require approval by the Board. However, an even more logical conclusion would be that the Board was proceeding under 12 C.F.R. § 564.4, which states in part:

> "When a plan of dissolution has been approved by the board of directors of a Federal association and by the Board, such plan shall be submitted to the members of such association at a duly called meeting and, when *approved by a majority* of the votes cast at such meeting, shall become effective." (Emphasis added.)

In full compliance with section 546.4, after the Board had conditionally approved the merger agreement on June 14, 1963, it was submitted to the Long Beach members who approved the agreement by a majority vote at their July 6, 1963 meeting.

During the administrative and district court proceedings, none of the parties contended that the second unnumbered paragraph of section 5(i) was applicable to this merger transaction. That paragraph of section 5(i) deals not with the kind of transaction before this court, the merger of a federal savings and loan association with a state savings and loan association, but with the

change of status of a federal savings and loan association to a state savings and loan association. The merger transaction involves two entities while a conversion transaction involves only one entity.

Moreover, the second unnumbered paragraph of section 5(i), which does not require Board approval, relates to a conversion from a federal mutual association to a state *mutual* association.[20] As the Board correctly points out, even if a conversion of a single entity from one form to another were stretched to include the merger of two entities, the "conversion" which took place here was not from a federal mutual to a state mutual, but from a federal mutual to a state *stock* association, the latter (Equitable) being the resulting or surviving institution.

We conclude that the second unnumbered paragraph of section 5(i) has no application to this transaction and therefore does not relieve the merging associations from the necessity of obtaining Board approval under the regulations referred to above.

With reference to the necessity of obtaining the approval of the Commissioner before a merger of a California state savings and loan association and a federal savings and loan association may be effectuated, sections 9203 to 9205 of the California Financial Code are controlling. Sections 9203 and 9204 authorize such mergers and specify conditions which must be met. Section 9205 expressly requires that any such merger must be approved by the Commissioner.

During the state and federal administrative proceedings, no one questioned the applicability of these state statutes, and Long Beach sought and obtained the Commissioner's approval of the merger agreement. Neither the district court, in its opinion, nor appellees, in this court, have questioned the applicability of these state statutes to merger transactions of the kind involved in this case.

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[20]This is made clear by the sixth proviso of the second unnumbered paragraph of section 5(i), which reads:

> ". . . (6) that, in the event of dissolution after conversion, the members or shareholders of the association will share on a mutual basis in the assets of the association in exact proportion to their relative share or account credits; . . ."

However, with regard to both the federal and the state requirements for obtaining administrative approval, the district court concluded that the Board and Commissioner should be deemed to have agreed to submit the disputed validity of the contested provisions to a "court of competent jurisdiction."[21] Observing that this was a court of competent jurisdiction, the district court held that it had jurisdiction of the subject matter and the parties ". . . and there is nothing further the Bank Board can do even if the matter were remanded." Therefore, upon holding that the disputed provisions in the merger agreement were void, the court reasoned, in effect, that it was empowered to formulate and enforce new pro rata distribution terms as a part of the merger plan, without any approval by the Board or Commissioner.

One of the reasons given by the district court for disposing of the case in this manner is based upon the following provision in the approved merger agreement:

> "This agreement is not intended to prohibit any shareholder member of Long Beach from taking appropriate action to exercise such rights, if any, which he may have to contest the merits or validity of the plan of dissolution of Long Beach, or any part thereof, incorporated herein."

In our opinion, the Board's approval of the merger agreement, with the inclusion therein of the provision preserving the right to litigate the merits or validity of the merger agreement or any part thereof, did not and could not, dispense with the necessity of obtaining approval of the Board and the Commissioner. Since the Board and the Commissioner are not parties to the merger agreement, the provision in question has no force as a contractual undertaking to abstain from performing their duties to approve

[21] The district court pointed out that, in advance of the Board's approval of the merger agreement, the Board was notified that Long Beach and the Committee were going to contest the validity of the distribution terms of the merger agreement, and that Equitable would probably file a suit in interpleader. The district court further observed that, with this knowledge, the Board nevertheless approved the merger agreement. The court added that in reliance upon this provision of the merger agreement permitting legal testing of any part of it, the parties proceeded to and did complete the merger, and immediately thereafter filed the suits now before us.

or disapprove. Their approval of the provision does not represent a voluntary abandonment of the Board's and Commissioner's responsibilities in this regard, because the provision purports to do no more than restate the existing legal right of shareholders to test, judicially, the merits and validity of a merger plan.[22] Moreover, neither the Board nor the Commissioner has the power to contract away, voluntarily abandon, or delegate to the courts, their responsibilities fixed by statute and regulation, to approve or disapprove merger plans.[23]

The district court did not explicitly state in its opinion that provisions of the settlement agreement, which preceded the merger agreement, constituted Board approval of the pro rata distribution provisions required by the court. However, the district court did note that the Board had previously approved the pro rata provitions of the settlement agreement. Long Beach argues, in effect, that the Board's approval of the pro rata provision of the settlement agreement constituted implied approval of the pro rata distribution provision required by the trial court.[24]

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[22]The provision did serve the purpose of assuring shareholders that, by voting for the merger, or abstaining, they had not waived their right to engage in such litigation.

[23]Prior to its conditional approval of the merger agreement on June 14, 1963, it was made clear to Long Beach that the Board did not regard that agreement as accomplishing a surrender of the Board's approval or disapproval function. This is evidenced by a Board letter, dated May 30, 1963, in which Gregory, President of Long Beach, was told:

> "For your information, it is the Board's position that, insofar as it is concerned, no Long Beach shareholder who abstains from voting on the plan at the meeting of Long Beach members will be prejudiced in any way by such abstention in the event action should be instituted against the Board, et al. attacking the validity or merits of the plan, in whole or in part. *The Board will otherwise employ every legal defense available to it to defend the plan's validity and its merits.* The Board believes that, since the plan will have been proposed by the management of Long Beach and approved by Long Beach members, Long Beach Federal will necessarily either have to defend the plan or take a neutral position. To do otherwise would be inconsistent with the action of its management and with the vote of its members approving the plan." (Emphasis supplied.)

[24]The settlement agreement did not involve the Commissioner, so nothing provided therein could possibly constitute the Commissioner's approval of anything.

It is true that Article XV of the settlement agreement evidenced the Board's approval of the liquidation plan set out therein, a plan which did provide for a pro rata distribution. However, under Article XV there was to be a pro rata *cash* distribution of Long Beach's surplus, not a pro rata distribution of Equitable's guarantee *stock*, as required under the subsequently-formulated merger agreement. At an earlier point in this opinion we have noted the substantial differences between the liquidation plan of Article XV of the settlement agreement and the dissolution plan of the merger agreement.[25]

Long Beach was not contractually bound to follow the liquidation plan of the settlement agreement, and it apparently had good reasons for not doing so. But when it decided to proceed by way of merger and dissolution, utilizing distribution and other terms substantially different from those of the Article XV plan, it was then required to once more seek approval of the Board and the Commissioner. Long Beach understood this and, as noted above, did seek and acquire the necessary approvals of the merger plan.[26]

Circumstances which developed after the Board approved the settlement agreement, particularly those having to do with the

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[25]In a letter from the Board to Gregory, President of Long Beach, dated January 17, 1963, the Board made it quite clear that ". . . Article XV of the Settlement Agreement was not applicable to that plan of dissolution of Long Beach by way of merger with Equitable and that Board approval was necessary before such plan could be submitted to the shareholders for their approval."

[26]The last paragraph of Article XVII of the *merger* agreement evidences Long Beach's recognition that the merger agreement was not an implementation of the Article XV liquidation plan of the *settlement* agreement, but was an alternative to it. Article XVII of the merger agreement reads in part:

> "Each Association does hereby reserve, pending consummation hereof, all rights and agreements between the parties pertaining to carrying out the purposes and intent of Article XV of that certain Settlement Agreement made between the Federal Home Loan Bank Board, Federal Savings and Loan Insurance Corporation and Long Beach Federal Savings and Loan Association dated February 14, 1962, and each Association specifically agrees that in the event, for any reason, the within Merger Agreement not be consummated, that each Association shall be bound by the agreements between the Associations pertaining to said Article XV and shall exert every effort to consummate the same."

influx of large accounts into Long Beach, led the Board to conclude that a pro rata distribution arrangement would no longer be fair and equitable. Consequently, the Board required that the more restrictive distribution plan of Articles VII and VIII of the merger agreement be substituted for the pro rata arrangement.

Under all of the circumstances related above, the Article XV distribution plan of the settlement agreement does not, either in fact or in law, represent Board approval of the court-required pro rata distribution plan.

We do not question the power of a district court, in appropriate circumstances, to determine the legality of provisions of a particular merger-distribution plan. We hold, however, that under the circumstances of this case the district court was without power to remedy what it regarded as invalid distribution provisions of an administratively approved merger-dissolution plan, by designating a revised distribution plan, without the administrative approval required by state and federal statutes and regulations, which plan it thereafter compelled the parties to follow.[27]

The problem then arises as to what remedy was available, assuming that the district court was correct in determining that the restrictive distribution provisions of the approved merger agreement were invalid. The Board contends that, under the circumstances of this case, no remedy was available.

Among the various kinds of relief which might have been requested by plaintiffs, was an injunction to prevent the consummation of the merger on September 10, 1963.[28] However, suits were not filed until immediately after consummation of the merger.

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[27]See *Federal Power Commission v. Idaho Power Co.*, 344 U.S. 17, 20; *Aircraft & Diesel Equipment Corp. v. Hirsch*, 331 U.S. 752, 767; *S.E.C. v. Chenery Corp.*, 318 U.S. 80, 88; *Fascination, Inc. v. Hoover*, 39 Cal.2d 260, 268, 246 P.2d 656, 661.

[28]Under some circumstances, shareholders aggrieved by a merger plan containing improper distribution provisions, might have a claim for damages for conversion against the surviving corporation. However, no such claims were asserted or litigated in the suits now before us.

Another possible remedy might have been the assertion of appraisal rights by aggrieved shareholders. Again, however, the complaints in the actions before us do not request such relief.

This relief was therefore not then available. It need only be added that Long Beach and the Committee did not seek injunctive relief of this character.

The Board seems willing to concede that a request to set aside the merger can be read into the general prayer for appropriate relief in the complaints. The Board argues, however, that relief of this kind is in any event not available because it is barred by laches. We question whether plaintiffs sought any such relief, but in any event we agree with the Board that such relief is barred by laches.

The doctrine of laches, in the area of corporate stockholders' remedies, is stated as follows in 13 Fletcher Cyclopedia Corporations (Perm. Ed.) § 5874, page 279:

> "If a stockholder, with knowledge of wrongful acts on the part of the directors or a majority of the stockholders, stands by for an unreasonable time without taking any steps to set the acts aside or otherwise interfere, and rights are acquired by others, his right to sue is barred by his laches, however clear his right to relief would have been if he had moved promptly."[29]

As indicated by this statement of the doctrine, three elements must be present for the defense of laches to apply: (1) full knowledge of the facts, (2) unreasonable delay in the assertion

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[29]See, also, 70 A.L.R. 53, annotation; *Mardel Securities, Inc. v. Alexandria Gazette Corporation,* 4 Cir., 320 F.2d 890, 896; *Narragansett Electric Lighting Co. v. Sabre,* 51 R.I. 37, 150 A. 756, 759. Laches is a defense to the action of a minority stockholder or shareholder to set aside corporate acts whether fraudulent or ultra vires. *Baker v. Spokane Sav. Bank,* 9 Cir., 71 F.2d 487, 492.

Although the Committee purports to represent a majority of the shareholders of Long Beach, the position which the Committee takes in this litigation is obviously adverse to the interest of all of the shareholders, comprising an overwhelming majority, who stand to gain by the restrictive distribution provisions of the merger agreement, and stand to lose by the pro rata distribution provisions of the judgments under review. In this litigation, then, the Committee (and Long Beach, since it joins in the Committee's position) actually occupy the status, or represent the interests, of minority shareholders challenging the terms of the approved merger agreement.

of an available remedy, and (3) intervening prejudice to another. All three of these elements are present with respect to any effort in these suits to set aside the merger of Long Beach and Equitable.

All Long Beach shareholders, the members of plaintiff Committee, and Long Beach, were on notice of all material facts with respect to the proposed merger after the mailing of the proxy statement in mid-June, 1963. A copy of the merger agreement, executed by Long Beach and Equitable on June 12, 1963, was attached to that proxy statement. It follows that these shareholders, the Committee and Long Beach had from at least the middle of June, 1963, until September 10, 1963, when the merger was consummated, within which to institute litigation seeking to enjoin the merger and dissolution. Instead, they deliberately chose to wait until the merger had been effectuated, before commencing court proceedings testing the validity of the merger plan.

The result was that, before the actions were filed, substantial rights had attached growing out of the effectuation of the merger, which rights would necessarily have been prejudiced if, as an outgrowth of the three court actions, the merger were to be set aside. Principal among these were the rights of the shareholders of Long Beach and Equitable, as of the day of the filing of the merger, to enjoy the benefits of the merger.

These shareholders had not surrendered or prejudiced these rights in advance by voting for a merger agreement containing the provision permitting a court test of the distribution provisions. They were agreeing only to such litigation, necessary to test the validity of those provisions, as could be accomplished without setting aside a merger once effectuated. Everyone concerned knew, at the time the merger agreement was approved, that there was time to commence such a suit before completion of the merger, thus making it possible to postpone the merger, voluntarily or by injunction, until the court test could be resolved.

In addition to prejudicing these rights of Long Beach and Equitable shareholders, who were such on the date of the merger, a setting aside of the merger would also prejudice the rights of Equitable shareholders who became such after the merger. Moreover, the practical difficulty, if not impossibility, of unscrambling and returning the intermingled assets of the merged Long Beach

and Equitable associations, would be seriously prejudicial to Equitable.[30]

The only other relief which is arguably available as an outgrowth of these actions is a judicial determination that the distribution provisions of the merger agreement are invalid. This, in turn, would call for the formulation of new distribution provisions, such as the pro rata arrangement, approved by the court with or without the approval of the Board and the Commissioner. It might be urged that, following this course of action, the revised distribution provisions could be made a part of the existing merger plan without setting aside the merger.

However, we have already stated why the district court is without power to formulate and enforce a new distribution plan free and clear of Board and Commissioner approval. And a remand to the Board and Commissioner for the formulation or approval of a new plan is inappropriate absent power in those agencies to approve or disapprove, as a whole, what would then become a revised merger plan. Stated differently, the Board and the Commissioner have no authority to review and consider provisions of a merger plan except in performance of their function to approve or disapprove the merger plan as a whole. The latter power no longer exists because the merger is in effect and laches bars plaintiffs from setting the entire merger aside.

There is still another obstacle to any court relief involving substitution of new distribution provisions for those presently set forth in the merger agreement without upsetting the merger. A merger must be the product of an agreement approved by the affected shareholders. The shareholders of Long Beach and Equitable have not approved of a merger agreement containing distribution provisions different from those in the agreement under which the merger was effectuated. Their approval of a revised merger agreement would therefore be necessary.

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[30]Equitable, which was an interpleader in the district court, represents to us that it would be "impossible" to now divest Equitable of the Long Beach assets and liabilities. Nearly four years have passed since the merger went into effect on September 10, 1963. Equitable urges that, after the passage of this much time, the present Equitable assets and liabilities cannot be divided into a "Long Beach bundle" and an "Equitable bundle."

Several difficulties would be encountered in seeking shareholder approval of a revised merger agreement at this late date. Without doubt, many individuals who were shareholders of Long Beach and Equitable when the vote was taken on the original merger plan, are no longer shareholders of Equitable, the surviving association. Likewise, in all probability, Equitable now has many shareholders who were not shareholders of Long Beach or Equitable when the original merger vote was taken. Moreover, all shareholders who would now be called upon to vote on a revised merger plan would be confronted by a coercive factor which was not present when they voted on the original merger proposal, namely, that the merger had been consummated. In addition, should the outcome of a new vote indicate disapproval, further turmoil, uncertainty and delay would be interjected.[31]

Thus we conclude that laches is a bar to these suits, whether the relief sought would or would not require a setting aside of the merger. In summary, by deliberately waiting with their law suits until after the merger had been consummated, the Committee and Long Beach sought to confront the court with an accomplished fact which would enable them to test the validity of the distribution provisions without interfering with the consummation of the merger. But the entanglements described above require us to characterize this studied delay as laches, barring any relief which might otherwise have been available.

For the reasons stated above, and without reaching the several other complex questions raised on these appeals, the judgments are reversed, and the causes are remanded with directions to dismiss the actions and return the impounded stock for distribution in accordance with the provisions of the merger agreement.

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[31]Having in view the extensive prior history of this controversy and the pendency of further litigation in this court and the district court (see note 2, above), it is easy to foresee the possibility that, unless soon brought to rest, this litigation could swallow up a substantial part of the excess Long Beach assets the parties are fighting about, and at the same time seriously cripple Equitable, as the surviving association.

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## Judgment No. 20378.

United States Court of Appeals, for the Ninth Circuit.

Federal Home Loan Bank Board, et al Appellants, vs. Sidney Elliot, et al, Appellees.

APPEAL from the United States District Court for the Southern District of California, Central Division.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Central Division and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is reversed and that this cause be, and hereby is remanded to the said District Court with directions to dismiss the action and return the impounded stock for distribution in accordance with the provisions of the merger agreement.

Filed and entered August 18, 1967.

**Judgment No. 20447.**

United States Court of Appeals, for the Ninth Circuit.

Federal Home Loan Bank Board, et al Appellants, vs. Sidney Elliott, et al Appellees.

APPEAL from the United States District Court for the Southern District of California, Central Division.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Central Division and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is reversed and that this cause be, and hereby is remanded to the said District Court with directions to dismiss the action and return the impounded stock for distribution in accordance with the provisions of the merger agreement.

Filed and entered August 18, 1967.

**Judgment No. 20522.**

United States Court of Appeals for the Ninth Circuit.

Federal Home Loan Bank Board, et al Appellants, vs. Equitable Savings and Loan Association, a California Corp., Appellee.

APPEAL from the United States District Court for the Southern District of California, Central Division.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Central Division and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is reversed and that this cause be, and hereby is remanded to the said District Court with directions to dismiss the action and return the impounded stock for distribution in accordance with the provisions of the merger agreement.

Filed and entered August 18, 1967.

## Order.

In the United States Court of Appeals, for the Ninth Circuit.

Federal Home Loan Bank Board, et al., Appellants, v. Sidney Elliott, et al., as the Shareholders Protective Committee of Long Beach Federal Savings and Loan Association and Long Beach Federal Savings and Loan Association, et al., Appellees. Nos. 20378, 20447, 20522.

Before: BARNES, HAMLEY and DUNIWAY, Circuit Judges.

Filed Jan. 12, 1968.

The motion of Long Beach Federal Savings and Loan Association and Elliott, et al., for permission to file a combined appellees' "Petition for Rehearing or Clarification and Suggestion for Hearing en Banc" exceeding five pages, filed September 14, 1967, and the motion of the same appellees for permission to file reply to appellants' response to petition for rehearing, filed December 29, 1967, are granted.

The "Petition for Rehearing or Clarification and Suggestion for Rehearing en Banc" is denied.

/s/ Frederick G. Hamley
/s/ Ben C. Duniway
United States Circuit Judges